No. 96-643

(2)

IN THE

Supreme Court of the United States

October Term, 1996

THE STEEL COMPANY, a/k/a
CHICAGO STEEL AND PICKLING COMPANY,
Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petition for writ of certiorari. Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation affecting the public interest. PLF was founded in 1973, has over 20,000 members, contributors, and supporters throughout the country, and maintains its principal office in Sacramento, California. PLF policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only when PLF's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases involving the interpretation of federal environmental laws. For example, PLF was a party of record in *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981). PLF also participated as amicus curiae in this Court in *Bennett v. Spears*, Supreme Court No. 95-813; *Douglas County, Oregon v. Babbitt*, Supreme Court No. 95-371; *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, __ U.S. __, 115 S. Ct. 2407 (1995); and *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989).

The Seventh Circuit ruling in this case, authorizing citizen enforcement of wholly past reporting violations under the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. § 11001, *et seq.*, expressly

contradicts a Sixth Circuit ruling on indistinguishable facts. This ruling also conflicts with the reasoning of this Court's unanimous decision in *Gwaltney v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987).

At issue in this case is not only the plain meaning of the citizen suit provision of EPCRA, but also the policy interests behind such provisions. Whereas the Sixth Circuit adopted this Court's reasoning in *Gwaltney*, that citizen suits (with forward-looking preenforcement notice requirements) are authorized to support, but not supplant, government enforcement of environmental laws, the Seventh Circuit reasoned the main purpose of such citizen suits is to reward citizen enforcers.

The Seventh Circuit ruling in this case creates unnecessary confusion in the important area of citizen enforcement of environmental laws. Review by this Court is necessary, therefore, to avoid confusion and promote the intent of Congress as expressed in the Emergency Planning and Community Right-to-Know Act.

PLF's public policy perspective and litigation experience in support of rational environmental protection and economic rights will provide a necessary viewpoint on the issues presented in this case.

STATEMENT OF THE CASE

The question presented in this case is whether Congress intended to authorize citizens, under the Emergency Planning and Community Right-to-Know Act, to seek penalties for violations that were cured before the citizen suit was filed. The facts which give rise to this question follow.

The Steel Company (Company) is a small, minority-owned steel manufacturer and pickler in Chicago, Illinois. The Company started in 1971 and employs about 55 people. The Company is subject to EPCRA which requires, among other things, the annual submission of chemical inventory and release forms to federal, state, and local entities pursuant to Sections 312 and 313. On March 16, 1995, Citizens for a Better Environment (CBE), an environmental citizen group, sent an EPCRA 60-day notice of intent to sue to the United States Environmental Protection Agency (EPA), the state, and the Company alleging the Company had never filed the requisite forms. Before the 60-day notice period had run, the Company filed the forms with the EPA. EPA chose not to pursue any enforcement action but, notwithstanding the filing, CBE filed suit in the Northern District Court of Illinois seeking, among other things, civil penalties against the Company.

A few days before CBE filed suit, the Sixth Circuit held, on facts indistinguishable from this case, that citizens could not sue for past EPCRA violations. *Atlantic States Legal Foundation v. United Musical, Inc.*, 61 F.3d 473 (6th Cir. 1995). The Company filed a motion to dismiss based on the Sixth Circuit's opinion, which was granted. CBE appealed, and on July 23, 1996, the Seventh Circuit reversed.

Although the Seventh Circuit noted the District Court's reliance on *United Musical* was not misplaced, and that *United Musical* relied on *Gwaltney*, the Court nevertheless rejected the Sixth Circuit holding. In *Gwaltney*, this Court considered the 60-day notice provision for citizen suits under the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, and unanimously held the purpose of the provision is to allow the alleged violator to come into compliance, thus making a citizen suit unnecessary. According to this Court, the power to sue for penalties based on past violations rested solely with the government. In this case, however, the Seventh Circuit reasoned it is more important to reward citizen groups for their enforcement efforts.

SUMMARY OF ARGUMENT

The Seventh Circuit ruled citizens may sue for wholly past violations of EPCRA. This ruling conflicts with a Sixth Circuit decision on essentially the same facts. This conflict is not inferred but openly acknowledged by the Seventh Circuit. That court flatly disagreed with the Sixth Circuit's more narrow reading of the citizen suit provision of EPCRA that citizen suits are limited to prospective relief. The Seventh Circuit decision is not supported by the plain meaning of the Act, the legislative history, or the policy objectives of such citizen suits. In consequence of this conflict, regulated entities are subject to inconsistent enforcement of the law and potentially immense citizen suit liability in one jurisdiction and not in another.

The Seventh Circuit ruling is also contrary to the unanimous opinion of this Court in *Gwaltney* in which this Court held that if citizen suits may target purely historical violations, the requirement of notice to the alleged violator becomes gratuitous. The citizen suit is meant to supplement rather than supplant discretionary government action. The Seventh Circuit rejects this reasoning outright and holds EPCRA must be interpreted to award citizens for their enforcement efforts. This interpretation is untenable and cannot be reconciled with a plain reading of the Act.

To ensure even-handed application of the law, to rectify the confusion this case creates over the scope of citizen suits under EPCRA, and to clarify the policy objectives of such citizen suit provisions, this Court should grant the writ of certiorari.

ARGUMENT

I

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE SIXTH AND SEVENTH CIRCUITS ON THE SCOPE OF THE CITIZEN SUIT PROVISION OF EPCRA

There can be no doubt that a real conflict exists between the Sixth and Seventh Circuits as to the scope of the citizen suit provision of EPCRA. The Seventh Circuit expressly stated, "we disagree with the Sixth Circuit's interpretation of the citizen enforcement provisions of EPCRA in *Atlantic States Legal Foundation, Inc. v. United Musical Instruments U.S.A.*" *Citizens for a Better Environment v. The Steel Company*, 90 F.3d 1237, 1242 n.1 (1996) (*Citizens*). In *United Musical*, the Sixth Circuit held, "the plain language and structure of EPCRA lead us to conclude that citizen plaintiffs may not bring actions that seek civil penalties for purely historic violations." *United Musical*, 61 F.3d at 478. This conflict is untenable and should be resolved.

Under Sections 312 and 313 of EPCRA, civil penalties can amount to $25,000 per violation. Each day is a separate violation. *Citizens*, 90 F.3d at 1241. Nevertheless, as the Seventh Circuit observed in this case, "[m]any industrial companies subject to the Act remained unaware of its existence long after it went into effect" in 1986. *Id.* at 1238. The EPA estimated that of the approximately 30,000 facilities required to submit Section 313 forms, over one-third had not. General Accounting Office, EPA's Toxic Release Inventory Is Useful But Can Be Improved, at 49 GAO/RCED 91-121 (June, 1991). Additionally, according to an EPA report sent to the Office of Management and Budget, specified annual reporting requirements under

EPCRA Sections 311 and 312 potentially affect 866,285 facilities. 60 Fed. Reg. 35201. For those facilities that are still unaware of EPCRA, the potential liability is immense. Indeed, CBE alleges the Company in this case was out of compliance for approximately eight years. The Company's potential liability under a retroactive citizen suit in the Seventh Circuit is, therefore, close to $73,000,000, whereas in the Sixth Circuit the Company would have no citizen suit liability (although in either jurisdiction the federal government may pursue its own enforcement actions for historical violations).

This level of disparate treatment under the law has significant ramifications for the economic competitiveness of companies and is based solely on the federal circuit in which they happen to be located. This Court should review the Seventh Circuit decision in light of *United Musical* and provide a consistent interpretation of EPCRA. To that end, an analysis of the Circuits' conflicting viewpoints is instructive.

A. On Facts Indistinguishable from This Case, the Sixth Circuit Held Citizens May Not Sue for Wholly Past Violations of EPCRA

In *United Musical*, the Atlantic States Legal Foundation sent United Musical Instruments a notice of intent to sue for that company's failure to submit the chemical release reporting forms required by Section 313 of EPCRA. Within the 60-day notice period, the company submitted the forms, and the foundation sued the company in federal District Court for the past violation. (The Seventh Circuit held these facts are indistinguishable from the present case. *Citizens*, 90 F.3d at 1242.) The District Court dismissed the case as time-barred. On appeal, the Sixth Circuit upheld the dismissal because EPCRA does not allow citizen suits for past

violations that have been cured by the date the action commences. *United Musical*, 61 F.3d at 475.

To reach this conclusion, the court looked first at the language of the statute and found Congress could have phrased its requirements in language that looked to the past but it did not choose this readily available option. *Id.* at 477. Rather, the court determined the most natural reading of the citizen suit provision of EPCRA weighs against allowing citizen suits for purely historical violations. *Id.* The court then looked at the legislative history of EPCRA and determined there is nothing indicating Congress intended to allow citizens to sue for past violations. *Id.*

Another decisive factor in the court's determination was this Court's discussion in the *Gwaltney* opinion concerning the role of citizen suits in the Clean Water Act. The court noted that EPCRA, like the Clean Water Act, prohibits citizen suits once EPA has commenced an enforcement action. In *Gwaltney*, this Court stated the bar on citizen suits when government enforcement action is under way suggests citizens suits are meant to supplement rather than supplant governmental action. *Gwaltney*, 484 U.S. at 60. In further reliance on *Gwaltney*, the Sixth Circuit pointed out this Court's expressed concern about the potential of citizen suits to inhibit the ability of government officials to exercise discretion in using their enforcement powers. This Court stated the EPA might, for example, deem it in the public interest to forego civil penalties in a particular case for some concession from the violator and that allowing citizen suits years later for the same violation would curtail considerably such discretion and change the citizen's role from interstitial to potentially intrusive. *Id.* at 61. This Court concluded that Congress could not have intended such a result. *Id.*

Contrary to the Sixth Circuit's ruling in *United Musical*, that EPCRA does not allow citizen suits for past violations,

the Seventh Circuit in this case considered the same citizen suit provision of EPCRA and came to the opposite conclusion.

B. The Seventh Circuit Decision Contradicts the Sixth Circuit Decision in Every Particular

The Seventh Circuit in this case also looked first to the language of the statute. But, contrary to the Sixth Circuit finding in *United Musical*, the Seventh Circuit found the citizen suit provision of EPCRA does look to the past. However, where the Sixth Circuit required explicit congressional language allowing citizen suits for historical violations, the Seventh Circuit was satisfied with something much less.

For example, the Seventh Circuit noted EPCRA authorizes citizens to sue "for failure to" comply with the statute. The court then maintained this ambiguous reference "can indicate a failure past or present." *Citizens*, 90 F.3d at 1243. The Seventh Circuit also noted that for citizen suits notice of intent to sue must be given to the EPA, the alleged violator, and "the State in which the alleged violation occurs." *Id.* at 1244. Although the term "occurs" in the notice provision clearly connotes something ongoing, the Seventh Circuit unabashedly maintained, "[n]owhere does EPCRA contain the 'is occurring' language of the CWA [Clean Water Act] to indicate that citizens must allege an ongoing violation." *Id.*

Aside from its strained reading of the statutory language, the Seventh Circuit cites nothing in the legislative history to justify its conclusion that EPCRA authorizes citizen suits for past violations. Rather, the court infers Congress intended to allow such suits when it amended the Clean Air Act. 42 U.S.C. § 7401, *et seq*. In 1990, Congress amended the Clean Air Act to allow citizen enforcement actions for

historical violations, but left the notice provision intact. According to the Seventh Circuit, the rationale behind *Gwaltney*, that the existence of a 60-day notice provision allows violators to come into compliance and that allowing citizens to sue after violations ceased would defeat the purpose of the notice provision and undercut the EPA's enforcement discretion, becomes less compelling when considered in light of this amendment to the Clean Air Act. *Id.* But the Sixth Circuit had a response to that argument.

In *United Musical*, the court acknowledged this argument has a certain logic but determined it is unpersuasive since one can argue with equal force that by amending the Clean Air Act, but not amending EPCRA, Congress intended to limit EPCRA's citizen suit provision to violations existing at the time the suit is filed. *United Musical*, 61 F.3d at 477. In fact, the Sixth Circuit concluded in the absence of explicit congressional language mandating such a result--as in the amended Clean Air Act--the court must reject the argument. *Id.*

Finally, the Seventh Circuit considered the purpose of the citizen suit provision and concluded the provision must be interpreted to reward citizens for their enforcement efforts. *Citizens*, 90 F.3d at 1244. According to the court, allowing citizen suits for past violations would advance this purpose. *Id.* However, this view runs counter to that adopted by the Sixth Circuit in *United Musical* and this Court in *Gwaltney* that citizen suit provisions, like the provision in this case, are intended to only supplement, but not replace, the enforcement efforts of the government.

The scope of citizen suit actions in our environmental statutes is an important question of law. The split in the Circuits occasioned by the Seventh Circuit decision in this case is the very type of conflict that demands resolution by this Court. It causes confusion and results in contradictory

enforcement of the law. Commercial businesses operate in numerous jurisdictions and are subject to a myriad of complex, often onerous, regulatory programs that hinder or stymie economic production. These entities should not be subject to uncertain or inconsistent application of federal law. For these reasons, this Court should grant the writ of certiorari.

II

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE SEVENTH CIRCUIT'S DECISION AND THIS COURT'S OPINION IN *GWALTNEY*

In *Gwaltney*, this Court had to consider whether the Clean Water Act (CWA) conferred jurisdiction over citizen suits for wholly past violations. This Court determined the Act did not confer such jurisdiction citing, among other things, the forward-looking language, and the purpose of the citizen suit provision.

This Court stated one of the most striking indicia of the prospective orientation of the citizen suit is the pervasive use of the present tense. *Gwaltney*, 484 U.S. at 59. By way of example, this Court cited the notice provision of the Clean Water Act that citizen-plaintiffs must give notice to the alleged violator, the administrator of the EPA, and the state in which the violation "occurs." *Id* at 59. This interpretation of the word "occurs" as present tense stands in stark contrast to the interpretation given this same word in the notice provision of EPCRA by the Seventh Circuit. Contrary to a plain reading of the statute, the Seventh Circuit held the enforcement provisions of EPCRA, including the word "occurs," are not likewise cast in the present tense. *Citizens*, 90 F.3d at 1244.

Perhaps a more telling indication of the conflict between the Seventh Circuit opinion in this case and this Court's opinion in *Gwaltney*, than the hypertechnical parsing of the language of the statute, is the Seventh Circuit's flat rejection of this Court's policy rationale for disallowing CWA citizen suit actions for wholly past violations.

In *Gwaltney*, this Court reasoned retroactive citizen suits would render incomprehensible the CWA notice provision that requires citizens to give 60-day's notice of their intent to sue to the alleged violator as well as to the administrator of the EPA and the state. *Gwaltney*, 484 U.S. at 59. "If the Administrator or the State commences enforcement action within that 60-day period, the citizen suit is barred, presumably because governmental action has rendered it unnecessary." *Id*. According to this Court, it follows logically that "the purpose of notice to the alleged violator is to give it an opportunity to bring itself into compliance with the Act and thus likewise render unnecessary a citizen suit." *Id*. at 60. In a unanimous opinion, this Court stated: "If we assume, as respondents urge, that citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes gratuitous." *Id*.

But this Court did not stop there. Rather, it noted a contrary view would create a second and even more disturbing anomaly. This Court pointed out that the bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than supplant government action. *Id*. "Permitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit." *Id*. To illustrate this danger, this Court posed a hypothetical.

Suppose the administrator of the EPA identified a violator and issued a compliance order. *Id*. "Suppose

further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take." *Id.* at 61. "If citizens could file suit, months or years later, in order to seek the civil penalties the Administrator chose to forego, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably." *Id.* "The same might be said of the discretion of state enforcement authorities." *Id.* This Court concluded an interpretation of the scope of the citizen suit provision of the Act, allowing citizen suits for past violations, would change the nature of the citizen's role from interstitial to potentially intrusive. *Id.* "We cannot agree that Congress intended such a result." *Id.*

Clearly, Congress did not intend such a result under the Clean Water Act or the Emergency Planning and Community Right-to-Know Act. This Court's policy rationale for limiting the scope of the citizen suit provision of the CWA applies equally to EPCRA: EPCRA contains a prohibition on citizen suits when the government acts; the notice provision of EPCRA contains forward-looking language; and the legislative history does not suggest a contrary congressional intent. Nevertheless, the Seventh Circuit flatly rejected this Court's reasoning in *Gwaltney*.

The sole basis for the court's rejection of this Court's policy considerations was an amendment to an act other than EPCRA. The Seventh Circuit held the reasoning of this Court is no longer as compelling as it was when *Gwaltney* was decided because, since then, Congress amended the Clean Air Act, to permit citizen enforcement actions for past violations, yet left the notice provision intact. *Citizens*, 90 F.3d at 1244. The Seventh Circuit apparently believes that when Congress amended the Clean Air Act to explicitly allow citizen suits for past violations any statute with a

similar notice provision, like EPCRA, had been implicitly altered as well. Other environmental statutes which contain similar notice provisions, and which this Court has concluded authorize only prospective relief, include the Clean Water Act, the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.*, and the Toxic Substances Control Act, 15 U.S.C. § 2601, *et seq.* *Gwaltney*, 484 U.S. at 57. Have these acts also been changed by amendment of the Clean Air Act? The position of the Seventh Circuit is unreasonable. All the amendment of the Clean Air Act shows is that Congress knows how explicitly to authorize citizen suits for wholly past violations, in particular situations, when it intends to do so. *See id.* Congress never explicitly authorized such citizen suits in EPCRA.

In place of, and totally contrary to, the policy rationale applied by this Court in *Gwaltney*, the Seventh Circuit suggested a rationale that seeks foremost to reward citizen enforcers. The Seventh Circuit held EPCRA creates a structure that encourages private citizens to invest the resources necessary to uncover violations of the Act by allowing courts to award the costs of enforcement to substantially prevailing parties. *Citizens*, 90 F.3d at 1244. If citizen suits could be fully prevented, the court argues, by completing and submitting forms, however late, citizens would have no real incentive to incur the costs of learning about EPCRA, investigating suspected violators, and analyzing information. *Id.* Put simply, the court stated, if citizens can't sue, they can't recover the costs of their efforts. *Id.* "Private enforcement of the reporting requirements would undoubtedly drop off." *Id.* at 1245.

What the Seventh Circuit overlooks, however, is that EPCRA, like the CWA, contains a provision that bars citizen suits when the government chooses to enforce the Act. 42 U.S.C. § 11046(e). If the government exercises its enforcement discretion, citizens cannot bring a suit and

recover their costs anyway. Therefore, limiting citizen suits to prospective relief leaves citizens no worse off than if the government chooses to act, and the government has discretion to act in all cases. To achieve, in all cases, the ends suggested by the Seventh Circuit--to reward citizens for their enforcement efforts--EPCRA would have to be read to authorize a citizen suit every time a citizen sends a notice of intent to sue, even if the government pursues a discretionary enforcement action. Clearly, Congress did not intend such a result.

The Seventh Circuit laments that if citizen suits are not allowed for wholly past violations under EPCRA, citizen suits could only proceed when a violator receives notice of intent to sue and still fails to comply. *Citizens*, 90 F.3d at 1244. That is correct and that is precisely what Congress intended. The Seventh Circuit has forgotten the paramount objective of citizen suits is to encourage compliance and assist, not replace, government law enforcement. That is the theme pervading this Court's ruling in *Gwaltney*. However, the Seventh Circuit would convert that objective to a form of vigilante justice by encouraging citizen lawsuits that cannot further environmental protection but serve only to tax judicial resources, punish regulated parties, and reward citizen-plaintiffs in bounty hunter fashion.

The Seventh Circuit decision flatly contradicts this Court's reasoning in *Gwaltney* that if citizen suits may target wholly past violations, the forward-looking requirement of notice to the alleged violator becomes gratuitous. This conflict creates confusion about the purpose and scope of the citizen suit provision of EPCRA and other environmental laws. This Court should grant the writ of certiorari to rectify this confusion.

CONCLUSION

The Seventh Circuit's decision is in conflict with the Sixth Circuit's decision in *United Musical* and inconsistent with the unanimous opinion of this Court in *Gwaltney*. These conflicts place regulated entities in an untenable position by subjecting them to uncertain liability and inconsistent enforcement under EPCRA. To ensure an even-handed application of the law and avoid confusion over the scope of citizen suit provisions in environmental statutes, this Court should grant the writ of certiorari and review and overturn the Seventh Circuit decision.

DATED: November, 1996.

Respectfully submitted,

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